

TAM:DBS:mel:2000V00753

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

|                            |   |                        |
|----------------------------|---|------------------------|
| M. ASH-SHARIEF AL'ASKARI,  | : |                        |
| Plaintiff                  | : | Civil No. 1:CV-00-1449 |
|                            | : | (Caldwell, J.)         |
| v.                         | : | (Smyser, M.J.)         |
|                            | : |                        |
| KATHLEEN HAWKES, et al., , | : | Electronically Filed   |
| Defendants                 | : |                        |

BRIEF IN OPPOSITION TO PLAINTIFF'S  
"MOTION TO REMOVE DEFENDANTS'  
COUNSEL FOR UNETHICAL CONDUCT"

**I. Procedural History**

Al'Askari is a former inmate once incarcerated at FCI Allenwood. In 2000, he filed this Bivens action against four BOP employees alleging violations of his due process rights and a denial of access to the courts. The only remaining issue and defendant is an access to courts claim against defendant Goldring.

On July 29, 2003, a notice of deposition was served upon Al'Askari noticing him that his deposition would be conducted on August 14, 2003, at 10:00 a.m. in the Harrisburg branch office of the United States Attorney's Office. In response, Al'Askari filed a motion for appointment of counsel. The motion has since been denied.

On August 13, 2003, counsel for defendant received a "Notice of Deposition" from Al'Askari indicating that he intended to take the depositions of Robin Greggs and Viola Hursh immediately following his scheduled deposition on August 14, 2003. See Exh. 1, Notice of Deposition. Al'Askari's signature block on the notice contained his mailing address, electronic mail address, telephone number, and facsimile number where he can be contacted. Id., p. 2.

In response to the notice of depositions, counsel for the Government sent a letter to Al'Askari indicating that neither Greggs nor Hursh would be appearing for depositions the following day.<sup>1</sup> The letter explained first, that one-day notice was not "reasonable notice" to depose a witness under Federal Rule of Civil Procedure 30(b)(1). Second, since Greggs and Hursh are no longer parties to the action, Al'Askari was required to serve a deposition subpoena on them in accordance with Federal Rule of Civil Procedure 45. Third, Al'Askari was informed that, even though he is proceeding *in forma pauperis*, he is still required to pay his own discovery expenses, including witnesses' fees and mileage, and the costs of a court reporter. Finally, since discovery was scheduled to close on August 25, 2003, counsel agreed to accept service of the deposition subpoenas on behalf of

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<sup>1</sup>Several attempts to fax the letter to Al'Askari at the number provided in his Notice of Deposition were unsuccessful.

Greggs and Hursh, if Al'Askari was willing to comply with the Federal Rules of Civil Procedure. Counsel also indicated his availability on August 19, 20, and 25. See Exh. 2, Letter dated August 13, 2003.

On August 14, 2003, Al'Askari's deposition was taken as scheduled.

On August 21, 2003, Al'Askari filed a motion for enlargement of time to complete discovery. In support of his motion, Al'Askari cited defendant's failure to produce Greggs and Hursh for depositions on August 14, 2003, and counsel's line of questioning during his deposition which he claimed to be irrelevant to the "sole" issue of this case, which he believes to be limited to whether he exhausted his administrative remedies. See Doc. 70. Al'Askari did not seek the concurrence of undersigned counsel in the filing of his motion. Nonetheless, the motion was subsequently granted and the deadline for completion of discovery was extended to October 15, 2003.

On August 22, 2003, Al'Askari filed a request for the issuance of three witness subpoenas, pursuant to Fed. R. Civ. P. 45, in order that he can obtain the attendance of non-parties for depositions. See Doc. 72. Three subpoenas signed by the Clerk of Court were forwarded to plaintiff the same day. See Doc. 73.

On August 27, 2003, counsel received, via facsimile, a Notice of Deposition and subpoenas for Robin Greggs, Viola Hursh,

and inmate Irving Alvin commanding each of them to appear for depositions on September 9, 2003, at 11:30 a.m. "at the office of Joseph McClusky, attorney, FCI Allenwood Complex, White Deer 17887." See Exhs. 3 and 4. The facsimile also included notes to Greggs and Hursh informing them of their right to waive witness fees. See Exh. 5.

On August 28, 2003, the Government received, via facsimile, a Notice of Deposition for defendant Goldring for "Tuesday, 9 September, at 11:30 at the office of Joseph McClusky, Esq., attorney advisor . . . at Allenwood Federal Complex, White Deer 17887." See Exh. 6.

On September 3, 2003, counsel for defendant sent a letter to Al'Askari via federal express and facsimile<sup>2</sup> informing him that the depositions of Greggs, Hursh, Goldring and inmate Irving could not take place on September 9, 2003, primarily because defendant Goldring, who no longer resides in the Commonwealth of Pennsylvania, was not available on that date. Al'Askari was also advised that Federal Rule of Civil Procedure 30(a)(2) required him to first seek leave of Court prior to deposing inmate Irving. The letter also suggested that the depositions take place at the United States Attorney's Office in Harrisburg because the Warden of FCI Allenwood would not agree to have the depositions

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<sup>2</sup>The United States Attorney's Office telephoned Al'Askari in order to verify his facsimile phone number.

conducted at the prison. Additionally, Al'Askari was told that he would be provided with a list of available dates in the near future. See Exh. 7.

In a similar letter dated September 5, 2003, Al'Askari was advised that Goldring, Hursh, and Greggs were all available to be deposed during the week of September 29, 2003. Al'Askari was also reminded of his responsibility, under Federal Rule of Civil Procedure 30(b), to make arrangements for a court stenographer. See Exh. 8.

Later that day, Al'Askari was contacted by telephone in an effort to reschedule the depositions.<sup>3</sup> Although the week of September 29, 2003, was the only week in September available for the defendant, the staff witnesses, the undersigned, and agency counsel, Al'Askari indicated he was not available that week. Al'Askari instead indicated his desire to do the depositions on October 9th or 10th. Additionally, in response to the Warden's concern with having the depositions conducted at the prison, Al'Askari suggested the Williamsport United States Attorney's Office as an alternative site.

Unfortunately, when counsel for defendant later checked the availability of others for October 9 or 10, he was reminded that

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<sup>3</sup>The United States Attorney's Office has telephoned Al'Askari twice: (1) once to request his facsimile number, which he refused to provide; and (2) to inform him that depositions could not take place at FCI Allenwood on September 9, 2003.

agency counsel is scheduled to be out-of-state on business that entire week. Additionally, the undersigned determined that the Williamsport Office was too small to accommodate the depositions.

On September 8, 2003, counsel again wrote to Al'Askari regarding the scheduling of depositions. Al'Askari was asked to again review his schedule and see if it was possible to depose the witnesses on any day during the week of September 29 through October 2. If not, Al'Askari was requested to provide a list of alternative dates in order to determine the witnesses' availability. Additionally, counsel explained the difficulty in conducting the depositions in the Williamsport branch office and again proposed that he reconsider scheduling them in Harrisburg. If Al'Askari agreed, he was told that Hursh and Greggs would waive the witness and mileage fees they would otherwise be entitled to under Rule 45. Thus, Hursh and Greggs would appear in Harrisburg at no cost to Al'Askari. Moreover, Al'Askari's own travel expenses from Philadelphia would be less due to the shorter distance to Harrisburg. Al'Askari was once again reminded of his responsibility for reserving a court reporter and was provided with a listing of agencies that offer stenographic services. See Exh. 9.

On September 16, 2003, Al'Askari wrote to the Court complaining about purported unethical conduct by counsel and U.S. Probation Officer Stephen Carmichael. By letter dated September

18, 2003, the Court informed Al'Askari that no action would be taken on his letter as the Federal Rules of Civil Procedure require him to file a written motion. On September 26, 2003, Al'Askari filed a formal motion to have counsel for defendant removed from this case. Defendant opposes the motion.

## **II. Question Presented**

Should Al'Askari's motion to have counsel removed be denied?

## **III. Argument**

Al'Askari requests that counsel for defendant be removed from this proceeding, claiming he is engaging in unethical conduct because he has had communications with his former probation officer.

The supervision of the professional conduct of attorneys practicing in a federal court is a matter of federal law. United States v. Miller, 624 F.2d 1198, 1199 (3d Cir. 1980); IBM v. Levin, 579 F.2d 271, 279 n. 2 (3d Cir. 1978). The district court's power to disqualify an attorney is derived from its inherent authority to supervise the professional conduct of attorneys appearing before it. United States v. Miller, 624 F.2d at 1201; Richardson v. Hamilton International Corp., 469 F.2d 1382, 1385-86 (3d Cir. 1972); E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 376-77 (S.D. Tex. 1969).

Although disqualification ordinarily is the result of a finding that a disciplinary rule prohibits an attorney's

appearance in a case, disqualification never is automatic. United States v. Miller, 624 F.2d at 1200. A court should disqualify an attorney only when it determines, on the facts of the particular case, that disqualification is an appropriate means of enforcing the applicable disciplinary rule. It should consider the ends that the disciplinary rule is designed to serve and any countervailing policies, such as permitting a litigant to retain the counsel of his choice and enabling attorneys to practice without excessive restrictions. Id. See also United States ex rel. Sheldon Electric Co. v. Blackhawk Heating & Plumbing Co., 423 F. Supp. 486 (S.D.N.Y. 1976); Baglini v. Pullman, Inc., 412 F. Supp. 1060 (E.D. Pa. 1976), aff'd, 547 F.2d 1158 (3d Cir. 1977).

As a general rule, the remedy of disqualification rests in the discretion of the district court and, except where purely legal issues are involved, may be reversed only for a clear abuse of this discretion. United States v. Miller, 624 F.2d at 1201; IBM v. Levin, 579 F.2d at 279 (*citing* Kramer v. Scientific Control Corp., 534 F.2d 1085, 1088 (3d Cir. 1976); Kroungold v. Triester, 521 F.2d 763, 765 (3d Cir. 1975); Greene v. Singer Co., 461 F.2d 242 (3d Cir. 1972)).

In the Third Circuit, the disqualification of an attorney has been upheld for such "outrageous conduct" as making verbal threats to "kill" opposing counsel, Comuso v. Nat'l Railroad



Passenger Corp., 267 F.3d 331 (3d Cir. 2001), the potential for a conflict of interest should defendant use an attorney who also served as an informant for the government, United States v. Voight, 89 F.3d 1050 (3d Cir. 1996), or for a law firm to represent prosecution witnesses in parallel civil RICO action in which they were defendants, United States v. Stewart, 185 F.3d 112 (3d Cir. 1999), or for a defense attorney to represent multiple co-defendants, United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).

In this case, Al'Askari fails to state a legal basis for his argument or cite a specific disciplinary rule which was violated, warranting the removal of counsel. He makes no allegations so egregious and outrageous to warrant counsel's removal. Although Al'Askari has included a "brief in support of motion," it consists of two paragraphs and does not even address the relief he seeks. Instead, he utilizes the space to argue that the Court should have liberally construed his "letter" as a motion seeking counsel's removal rather than require him to file a formal "motion." Thus, Al'Askari's motion should be denied.

**Conclusion**

For the reasons stated above, Al'Askari's motion to have counsel for defendant removed from this case should be denied.

Respectfully submitted,

THOMAS A. MARINO  
United States Attorney

s/ D. Brian Simpson  
D. BRIAN SIMPSON  
Assistant U.S. Attorney  
Atty. I.D. No. OH 71431  
MICHELE E. LINCALIS  
Paralegal Specialist  
316 Federal Building  
240 West Third Street  
Williamsport, PA 17703  
Telephone: 717-221-4482  
Facsimile: 717-221-2246

Dated: October 7, 2003

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Middle District of Pennsylvania and is a person of such age and discretion to be competent to serve papers.

That on October 7, 2003, she served a copy of the attached

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by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Williamsport, Pennsylvania.

Addressee:

M. Ash-Sharief Al'Askari  
5737 N. 12<sup>th</sup> Street  
Philadelphia, PA 19141

s/ Michele E. Lincalis  
MICHELE E. LINCALIS  
Paralegal Specialist